No. 11067

United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES MILLER, JAKE and MARJORIE CROPLEY, FRANK and LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. and CECELIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ and LILLY HOOLIS, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

APPELLANTS' PETITION FOR REHEARING

FREDERICK PAUL,
518 Fourth & Pike Building,
Seattle 1, Washington.

WILLIAM L. PAUL, JR.,
Juneau, Alaska.
Attorneys for Appellants.

Sherman Printing & Binding Co., Seattle

No. 11067

United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES MILLER, JAKE and MARJORIE CROPLEY, FRANK and LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. and CECELIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ and LILLY HOOLIS, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

APPELLANTS' PETITION FOR REHEARING

FREDERICK PAUL,
518 Fourth & Pike Building,
Seattle 1, Washington.

WILLIAM L. PAUL, JR.,
Juneau, Alaska.
Attorneys for Appellants.

Sherman Printing & Binding Co., Seattle

CONTENTS

Citations

United States

Circuit Court of Appeals

For the Ninth Circuit

JAMES MILLER, JAKE and MARJORIE CROPLEY, FRANK and LILLY EDWARDS, WILLIE PETERS, JIMMIE JACK, DAVID WILLARD, HERBERT MERCER, SUSIE MICHAELSON, MARY JOHNSON, LILLY YARQUAN, EDWARD N. and CECELIA KUNZ, JENNIE KLANEY, JESSIE WILSON, JACOB YARKON, BESSIE VISAYA, JIMMIE K. HANSON, MARY GEORGE, PAUL RUDOLPH, WILLIAM KUNZ and LILLY HOOLIS, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE

APPELLANTS' PETITION FOR REHEARING

Come now the above-named appellants and petition for rehearing of the above-entitled cause, because of the denial by this Court of appellants' right to prove ownership of the land in question by proof of ownership prior to May 17, 1884. For cause movant petitioners refer to the attached brief which is hereby made a part hereof by reference.

WHEREFORE your petitioners pray that this Court grant a rehearing of this cause.

CERTIFICATE OF COUNSEL TO SUPPORT PETITION FOR REHEARING

This certifies that the undersigned, Frederick Paul and William L. Paul, Jr., attorneys for the above-named appellants, believe that appellants' petition for rehearing is well founded and meritorious; that it is not taken to delay final disposition of this cause; that it is taken in good faith.

BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

This petition is based upon two reasons: (1) The Treaty of Cession, 15 Stat. 539, is immaterial; (2) Whether or not it be material, Article III thereof extending Federal Indian law of continental United States to Alaska likewise extended the doctrine of "original Indian title."

We are not aware of a single instance when the United States of America has acquired land by way of purchase or discovery that the doctrine of "original Indian title" was not extended thereto.

So uniform has been the rule that the Supreme Court of the United States has required "plain and unambiguous action to deprive the Walapais of the benefit of that policy." *United States As Guardian of Indians of the Tribe of Hualpai in the State of Arizona v. Sante Fe Pacific Railroad Company*, 314 U.S. 339, 346 (1941).

This Court has apparently found such "plain and unambiguous action" to deprive the Tlingit Indians of Alaska of the benefits of such policy (notwithstanding this Court's reliance on the Act of 1884) in the

Treaty of Cession between Russia and the United States by which this Court says Russia ceded *all* (with certain exceptions) property in Alaska, thereby extinguishing "original Indian title." Slip opinion page 7.

This treaty is not the first instance that European countries have conveyed to others property occupied by Indians. Despite such conveyances, the Supreme Court has uniformly respected "original Indian title." Moreover, Article III of the Treaty extends the doctrine of "original Indian title," see post page 6, to Alaska. We, therefore, respectfully submit the decision of this Court is in error.

In *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483 (1832), the Supreme Court considered the effect of the various grants from the King of England to various companies and which purported generally to convey "the soil, from the Atlantic to the South Sea." The Court stated as follows at pages 544-545:

> "This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoveries; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory

of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

"The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

"Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects, who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of man. They were well understood to convey the title which, according to the common law

> of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood."

In *Holden v. Joy*, 84 U.S. 211 (1872), the Court stated at page 224 as follows:

> "Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original title, acquired by immemorial possession, commencing ages before the New World was known to civilized man. Unmistakably their title was absolute, subject only to the pre-emption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs."

See:

> Cohen *Handbook of Federal Indian Law*, pages 291-294, 303-305.

This principle was first established in *Johnson v. McIntosh*, 8 Wheat. 543, 572-573 (1823) and in the words of Hon. Nathan R. Margold, when Solicitor of the Department of the Interior, spoken to the Supreme Court in the *Walapai* case, and authorized by the So-

licitor General of the United States, September 22, 1941, in scores of decisions from 1823 to this day:

> "the uniform course of congressional legislation and judicial decision makes it clear that the right of an Indian tribe in lands continuously occupied from time immemorial to protection against all claimants other than the United States is not a right dependent on geographical location of the tribe or on political history under prior sovereignties of the lands occupied. That such aboriginal occupancy is entitled to judicial protection against all parties has now become an established rule of Federal law. The legal right thus conferred upon a tribe does not require proof of similar right under any prior sovereignty nor by proof that the right which the laws allow has always in fact been respected by administrative officials or third parties."

either of the prior or present sovereignty. *Walapai Brief*, page 16.

That the doctrine of "original Indian title" was extended to Alaska in 1867 is made evident by the Treaty of Cession, Article III:

> "* * * The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country."

We know of no law more firmly established in Federal Indian law than the one requiring enforcement of "original Indian title."

Wherefore, appellants pray that their petition for rehearing be granted and that the decision heretofore rendered by this Court be enlarged to permit proof of ownership prior to May 17, 1884.

Respectfully,

FREDERICK PAUL,
WILLIAM L. PAUL, JR.,
Attorneys for Appellants.

Office and Postoffice Address:
FREDERICK PAUL,
518 Fourth & Pike Building,
Seattle 1, Washington.

WILLIAM L. PAUL, JR.,
P.O. Box 81,
Juneau, Alaska.